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No. 84-1538

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ALEXANDRA FISHER, ET AL.,
Appellants,

v.

CITY OF BERKELEY, ET AL.,
Respondents.

On Appeal from the Supreme Court of California

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE WESTERN MOBILEHOME ASSOCIATION IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

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Amicus curiae Western Mobilehome Association (WMA) respectfully moves this Court pursuant to Rule 36 of the Rules of Court for leave to file the attached brief amicus curiae in support of plaintiffs and appellants, Alexandra Fisher, et al.

Amicus WMA is a nonprofit organization formed in 1945 to promote the interest of mobilehome park owners and

operators in California through the sponsorship of educational programs, the collection and dissemination of information and publications of interest to mobilehome park owners and tenants, and by participation in legislative and judicial processes where the interests of our membership are at stake.

The interests of that membership, of some 1,800 members who provide the public with approximately 190,000 mobilehome rental spaces, are very much at stake in this Court's impending determination of jurisdiction in this case. Should this Court decline jurisdiction and leave intact the opinion of the California Supreme Court herein, it is feared that mobilehome park owners, among other capitalists attempting to serve California consumers, may face a new watershed of municipal price-fixing schemes. Because WMA perceives the denial of *stare decisis* effect to the opinion below as being in itself as important in practice to the protection of a capitalist economy as will be the exposition of this Court's own views on the topic, leave is respectfully sought to file the within brief on jurisdiction. It is respectfully submitted that amicus curiae WMA has a unique perspective in the action which may be of assistance to the Court, inasmuch as unlike lessors of structures, our members provide a temporary location for an interstate commerce product. As the within brief demonstrates, the interstate influx of that product is directly impeded and discouraged by respondents' price-fixing scheme.

Counsel for the Respondents has refused to consent to the filing of the within brief amicus curiae, thus necessitating this motion for leave to file same.

Because the practice directly affects interstate commerce, and because it clearly offends the Sherman Act's objectives and policy, Western Mobilehome Association prays the Court to file and consider the attached brief amicus curiae on behalf of plaintiffs and appellants.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE WESTERN MOBILEHOME ASSOCIATION IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

INTEREST OF AMICUS CURIAE

Amicus curiae Western Mobilehome Association (WMA) is a nonprofit association representing the interests of some 1,800 owners and operators of mobilehome spaces provided to owners and residents of mobilehomes in California.

WMA has a unique stake in the outcome of this action in that mobilehome parks have already been singled out for discriminatory treatment by the municipal advocates of rent controls. Of the 493 cities and counties in California, only 52 have succumbed to the temptation to fix rents. Of those 52, 38 fix rents on mobilehome space only, leaving only 14 that regulate all rental units. As the principal objects of roughly three-fourths of the illegal rent-fixing schemes imposed in California, WMA's members have a substantial stake in the outcome of this appeal—and are likely to bear the brunt of any watershed of new rent-fixing schemes occasioned by the "carte blanche" afforded municipalities by the opinion below.

Further, the statistical experience of the mobilehome industry under rent controls is uniquely instructive as to both interstate commerce involvement and the marketplace impacts of municipal price-fixing in the instant context.

Counsel for WMA are familiar with the issues presented by this action and believe that the information and perspective provided herein may be of assistance to the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court, in a series of municipal antitrust decisions culminating in the recent case of *Town of Hallie v. City of Eau Claire*, 53 L.W. 4418 (1985), has now settled the issue of municipal coverage under the Sherman Act (15 U.S.C. section 1, et seq.). *Stare decisis* of this Court clearly dictates that cities must respect the prohibitions of the antitrust laws except to the extent they enjoy the "state action" exemption therefrom first articulated in *Parker v. Brown*, 317 U.S. 341 (1943). The availability of that exemption depends upon a showing by the municipality that it is acting pursuant to a clearly articulated and affirmatively expressed state policy to displace that area of competition with regulation, with the legislature having "contemplated" that the particular kind of restraint being examined would be employed in the implementation of that state policy. *City of Lafayette v. Louisiana Power and Light Co.*, 435 U.S. 389, 412 (1978); *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 52 (1982); *Town of Hallie, supra*, 53 L.W. 4418, 4419 (1985).

There is no question in this case that California has no state policy displacing competition in rents with regulation of rental prices. Indeed, the opinion below notes, "California has no rent control statute," 37 Cal.3d at 655, reaffirming its opinion that the power to fix prices arises from the "home rule" provisions of California's Constitution. *Id.* It is submitted that there is no real issue herein as to the unavailability of *Parker* exemption.

Rather, the issue is whether the respondents' price-fixing scheme (1) impacts upon a market with "not insubstantial" ties to interstate commerce "as a matter of practical economics," *McLain v. Real Estate Bd.*, 444 U.S. 232,246 (1980), and (2) is preempted by the Sherman Act because it obstructs the policies promoted thereby, *California Retail Liquor Dealers Assn. v. Midcal Aluminum*, 445 U.S. 97 (1980). We respectfully suggest herein that the answer to each is in the affirmative, and further that the opinion below, unless superseded by plenary consideration and formal opinion by this Court, will have far-reaching and disastrous effects far beyond the economic boundaries of the housing market, applicable as it is to price fixing and other market manipulation of all goods and services.

ARGUMENT

I

RENT CONTROLS ON MOBILEHOME SPACES HAVE SUBSTANTIAL IMPACT UPON INTERSTATE COMMERCE

Despite the fact that "California has no rent control statute," 37 Cal.3d at 655, Appendix A at A-6, 52 California municipalities control rents on some or all residential units within their reach. Respondent City of Berkeley is one of the 14 cities that illegally fix rents on all units, including mobilehome spaces. Appendix G at A-112. The other 38 have focused exclusively upon mobilehome spaces.

A mobilehome park is a unique form of housing in that it is, in essence, a destination for an interstate commodity. For example, in January of 1984 the states of Florida, Texas, and North Carolina were the top three producers of mobilehomes in the Nation, while California ranked only twentieth in mobilehome production. Yet California ranks much higher as a point of destination for mobilehomes, having the third largest mobilehome population in the Nation. As a result, a very large proportion of mobilehomes presently situated in California traveled interstate to their present location.

Nor is the interstate role of these goods necessarily completed. Mobilehomes are just that, mobile homes. They are capable of being moved as needed to an interstate destination along with their owner, unlike permanent housing structures.

The interstate sale and transfer of these goods, however, is dependent upon the availability of mobilehome space. That availability is impaired by the heavy hand of local regulation restricting profits to a level deemed "fair" by a politically inspired bureaucrat. Compared with other, unregulated investments, volunteering to subject one's capital to such risks does not appear to most to be the wisest of investments. As a result, no significant construction of mobilehome park spaces in California has occurred since 1979, despite ever-increasing demand therefor. Such, it is submitted, is almost invariably the market response to rent controls, perpetuating the housing shortage the controls purport to ameliorate. *See* Hirsch, *From "Food for Thought" to "Empirical Evidence" About Consequences of Landlord-Tenant Laws*, 69 Cornell L. Rev. 604, 609-610 (1984); Siegan, *Commentary on Redistribution of Income Through Regulation in Housing*, 32 Emory L.J. 691, 698 (1983).

For the antitrust laws to be applied to this price-fixing scheme, it must first appear that the practice impacts upon an economic activity which as a matter of practical economics has a not insubstantial effect on interstate commerce. *McLain v. Real Estate Bd.*, 444 U.S. 232 (1980). It is not necessary to show the "more particularized showing" that the illegal conduct itself directly impacts interstate commerce, but only that the

"local" activity directly affected has "not insubstantial" ties to commerce. *Id.* at 242-243; *Turf Paradise, Inc. v. Arizona Downs*, 670 F.2d 813, 818 (9th Cir. 1982).

Here we have a locally created price-fixing scheme having a marked effect upon the "local" activity which is *absolutely essential* to an interstate industry. If mobilehome parks are not built, mobilehomes will not be sold in interstate commerce. It is submitted that the *de facto* "cap" placed on California mobilehome space by the "chill" of rent controls and the threat thereof is having a *very* significant effect in the interstate market place for mobilehome sales, and accordingly that the "nexus" here to interstate commerce is far stronger than the issue of a few percentage points of brokers' commissions found facially adequate in *McLain, supra.*

II

RENT CONTROLS CONFLICT WITH THE PURPOSES AND OBJECTIVES OF THE SHERMAN ACT

The purpose of the Sherman Act is to promote economic freedom, with resulting benefits to the economy as a whole, and *particularly* to hold inviolate the independent trader's discretion to set his own price as his judgment and market conditions dictate. *See United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972); *City of Lafayette v. Louisiana Power and Light Co.*, 435 U.S. at 406-407; *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221, 226 n.6 (1940).

Obviously rent controls obstruct the Sherman Act's basic policy dictate that an arrangement that interferes with the setting of price by free market forces is illegal on its face. *United States v. Container Corp.*, 393 U.S. 333, 337 (1969); *National Society of Professional Engineers v. United States*, 435 U.S. 679, 696 (1978). Price *ceilings* have long be condemned along with price *floors* due to their pernicious economic effects beyond the superficial "benefit" of price containment. *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982); *Albrecht v. The Herald Co.*, 390 U.S. 145, 152-153 (1968);

National Macaroni Mfrs. Assn. v. F.T.C., 345 F.2d 421 (7th Cir. 1965). This Court has heard before the complaint that some forms of price fixing are "good" and should be overlooked, and has correctly responded that, "that kind of argument is properly addressed to Congress and may justify an exemption from the statute for specific industries, but it is not permitted by the Rule of Reason." *Professional Engineers, supra,* 435 U.S. at 689-690. Those arguments have been made to Congress and a blanket exemption sought on behalf of cities, and Congress has refused to go so far. *See* House Judiciary Committee Report to the Committee of the Whole House on H.R. 6027 (Local Government Antitrust Act of 1984), H.R. Rep, 98-965, 98th Cong., 2nd Sess. (1984). It follows, we submit, that the lower court erred by refusing to apply *economic* rather than *political* principles to the question whether the respondents' price-fixing scheme conflicts with the Sherman Act. *See Hines v. Davidowitz,* 312 U.S. 52, 67 (1941); *Nash v. Florida Industrial Com.*, 389 U.S. 235, 239 (1967); *Jones v. Rath Packing Co.*, 430 U.S. 519, 540-541 (1977); Areeda & Turner, *Antitrust Law,* Vol. 1 (Little, Brown & Co., 1978) at 62; Tribe, *American Constitutional Law* (Foundation Press, 1978), section 6-24. The lower court deftly skirted the overwhelming *stare decisis* militating for a finding of preemption by reading into the Sherman Act a "public welfare defense" Congress had just rejected, and radically restructuring the principles of preemption under the Supremacy Clause. 37 Cal.3d at 673, 675, Appendix A at A-28, A-30.

If this Court does not curtail those radical shifts in the law by plenary consideration herein they will become *stare decisis* not only for the courts of California but for the federal courts as well. *Hicks v. Miranda,* 422 U.S. 332, 344-345 (1975). As a result there will be no real forum for the protection of a capitalist economy from overreaching regulations, and the "serious economic dislocation which could result if cities were free to place their own parochial goals above the Nation's economic goals," *Lafayette,* 435 U.S. at 412-413, will certainly come to pass. We beseech the Court to afford plenary consideration herein.

CONCLUSION

This case presents for the first time to this Court the issue of substantive conflict between municipal price fixing and the Sherman Act. Amicus curiae Western Mobilehome Association appears herein to advise the Court of the substantial interstate interests presently at the mercy of respondents and other like-minded municipal regulators who claim pursuant to general "home-rule" provisions of the California Constitution the power to fix private parties' prices in the marketplace. We submit that unless this Court affords its own plenary consideration herein the body of law heretofore developed in this Court and lower federal courts will be subsumed by this new, insurmountable "public welfare defense" which clearly thwarts the will of Congress and abolishes the muncipal antitrust restraints cautiously developed by this Court. We respectfully urge that the Court note probable jurisdiction and docket this case for briefing and argument on the merits.

Respectfully submitted,

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